Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

92-1590

No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Robert Kurz, Sr., et al

Petitioners

vs.

Anthony Mairone, et al

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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134 pp

QUESTIONS PRESENTED

I. Whether sufficient evidence was supplied to satisfy the RICO standard?

II. Whether there were genuine issues of material fact which should have been submitted to a jury as trier of fact? Whether Petitioners were prejudiced by Judge Kelly's interpretaticn of the evidence presented?

III. Whether Petitioners' due process rights granted by the Fourth Amendment and Fourteenth Amendments were violated by the defendants?

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No.

In the
SUPREME COURT OF THE UNITED STATES

Robert Kurz, Sr., et al

Petitioners

vs.

Anthony Mairone, et al

On Appeal from the United States Court of Appeals for the Third Circuit, No. 92-1399

PETITION FOR WRIT OF CERTIORARI

LOWER COURT OPINIONS

Opinions were entered by the United States District Court for the Eastern District of Pennsylvania in this matter on December 22, 1988, February 3, 1989 and ultimately in April, 1992, granted summary

judgment to the defendants. (NO. 86-5587). The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court without opinion on September 11, 1992.

JURISDICTION

Review of the judgment of the United States Court of Appeals for the Third Circuit entered on October 8, 1992 is sought. Authority for review on writ of certiorari is cited as case cites on the Table of Authority. This case involves an important conflict with precedents already decided under federal law.

STATEMENT OF THE CASE

Petitioner, Robert Kurz, Sr., leased a garage and fenced property at 4105-07 Kensington Avenue/1805 Worrell Street in December, 1983. He had a 3 to 5 year oral lease. When defendant, Active Auto Sales (hereafter Active) rented the other half of

the property in 1984. Petitioners began having problems, including street blockage and flooding of the street. Petitioners requested a written lease. The written lease ran from December, 1984 through December, 1985, with an automatic renewal clause. Defendant, Angelo Altimari (hereafter Altimari) the former lease agent for the owner and later land-owner of the property, began working in the sales operation of Active once Active moved onto the property in 1984.

In September, 1985, the property owners (including Altimari) obtained a writ of possession. Petitioners' counsel tried to obtain a hearing for Petitioners regarding the fraudulent documents defendants used to obtain the writ of possession, but he was not successful. In November, 1985, Active suffered severe vandalism to the vehicles on their property. Petitioners, Robert Kurz,

Sr., Robert Kurz, Jr. and Steven Kurz, were arrested for the vandalism and other felony charges and were released on bail pending trial. Counsel for defendants notified motion court of Petitioners' arrest and received an order that the Petitioners must vacate the premises by January 31, 1986 or pay a $1,000.00 fine.

On January 29, 1986, new counsel for Petitioners went into motion court and tried to have the order set aside for lack of jurisdiction. Petitioners were appealing the order denying their counsel's request at the time of the eviction.

On February 5, 1986, Defendant Deputy Sheriffs Lockhart and Monteleone (hereafter Lockhart and/or Monteleone) cut the locks of Petitioners' property and entered the property (on which all rent was paid and Petitioners' had full possession of since they were within their appeal period of Judge

White's January 29, 1986 order.) Other defendants, with the full cooperation of Lockhart and Monteleone, systematically removed and/or destroyed Petitioners' property while Petitioners were barred from removing anything under threat of arrest. All attempts Petitioners made to obtain the return of their property were rebuffed. Petitioners were forced to watch helplessly the blatant seizure and destruction of their property.

In March, 1986, the charges against Petitioner, Steven Kurz, were dismissed at the preliminary hearing. Petitioners, Robert Kurz, Sr. and Robert Kurz, Jr. went on trial in August, 1986 and were granted a demurrer.

All attempts to recover Petitioners' property, or its replacement value, proved fruitless. Suit was instituted in September, 1986 in the United States District Court for the Eastern District of Pennsylvania.

Limited discovery followed. (Although defendants were ordered to supply financial and other records, they failed to do so or be sanctioned for their failure to comply.) Judge Kelly refused to review the methods used by defendants in obtaining the writ of possession, considering it a collateral attack. Judge Kelly granted summary judgment to Lockhart and Monteleone on December 22, 1988. On January 11, 1989, Judge Kelly allowed Petitioners' counsel to withdraw. On February 3, 1989, he granted summary judgment to all defendants who were actively participating in the litigation. Various motions were filed to give Appellate Court jurisdiction. Finally, in April, 1992, Judge Kelly dismissed the last remaining defendant, Anthony Mairone. On September 11, 1992, Appellate Court affirmed Judge Kelly's ruling without an opinion. A petition for rehearing was filed and on October 8, 1992, the

petition was denied without an opinion. A motion for extension of time to petition for writ of certiorari was filed on January 5, 1993. The Supreme Court granted Petitioners' request and extended Petitioners' time to file the Petition for Writ of Certiorari to March 5, 1993.

ARGUMENT

I. Whether sufficient evidence was supplied to satisfy the RICO standard?

A person violates RICO when he does or conspires to (a) use income received from a pattern of racketeering activity to acquire interest in an enterprise, (b) acquire an interest in an enterprise through a pattern of racketeering activity, or (c) conduct or participate in the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962. Necessary elements of RICO include the existence of an enterprise, a pattern of criminal activity, and 2 or more predicate acts. 18 U.S.C. § 1961.

The conspiracy to defraud Petitioners of their property was begun by Altimari and Mairone, the land-owners, with the filing for a confession of judgment in September, 1985 using a clause specifically barred in the lease. Altimari and Mairone used an affidavit executed by Defendant, Ellis Bolot, which they knew was false. This false affidavit cited rent arrearage, city violations and other alleged "breaches" of the lease of Petitioner, Robert Kurz, Sr., all of which were untrue, unfounded and easily refutable.

In October, 1985, Petitioners were able to thwart a shut off of the electric service order by Active. In the process, Petitioners learned that Active was illegally tapping into Petitioners' electrical service. As a result, Active obtained their own electrical service for the first time at the demand of Philadelphia Electric.

Petitioners were arrested both times in November, 1985 based on statements made by Altimari that Petitioners had been evicted and did not belong on their lease premises. Officer Carlin testified to this fact at this deposition in Kurz v. Carlin, USDC #87-7338.

While the eviction proceeding was being litigated, Petitioners continued to work on their lease premises. Active continued to block the streets with their sales vehicles and conducted a car wash operation outside of Petitioners' property using a fire hydrant. Petitioners were harassed because their customers had difficulty getting to them because of the street blockage and flooded street. At the same time Active was receiving Petitioners' mail. Some of the mail came to the Petitioners open, some did not come at all.

Judge White's order of January 10, 1986 was very specific. It stated that Robert

Kurz, Sr. leave the lease property by January 31, 1986 OR pay a $1,000.00 fine (emphasis added). Defendants did not go back to Judge White to seek execution of this order. Instead, defendants seized the property of Petitioners, denying them due process. This was done in motion court where no hearings are held; not landlord-tenant court despite an impassioned plea by Petitioners' attorney.

Lockhart and/or Monteleone did cut the locks and enter Petitioners' leased property on which the rent was current and the Petitioners had legal possession of on February 5, 1986. When they cut the locks and confiscated Petitioners' property, it was their duty to protect it. Petitioners property was in their possession. Lockhart and Monteleone did confiscate and allow the destruction of Petitioners' property by defendants.

When Petitioners arrived at their lease property to begin their normal workday, they found their property open and occupied by defendants who were removing and/or destroying their property. Petitioners were barred from removing any of their property under threat of arrest by Lockhart and Monteleone.

No one in authority had a court order for the seizure or destruction of Petitioners' property. Petitioners received no legal documents. All parties who could possibly have ordered enforcement of this writ of possession that day have specifically denied doing so, either by testimony or affidavit.

Petitioners immediately notified their attorney who advised Petitioner, Rosemary Kurz, that he would contact the Sheriff's Department and Defendant, Orthodox Auto Parts Company (hereafter Orthodox). In subsequent

phone conversations on February 5, 1986, Petitioners were advised by their attorney that he had spoken with both the Sheriff's Department and Orthodox. They attorney told Petitioners to advise Lockhart and/or Monteleone to call their office, which the Petitioners believe either Lockhart and/or Monteleone did. Handwritten on the back of the writ of possession is a notation that Richard Hoy, City Solicitor, advised one of the Defendant Deputy Sheriffs to "evict the defendant, lock the premises while plaintiff (instead of defendant) is getting trucks and equipment to remove his possessions and trash." The notation is dated February 6, 1986 (instead of February 5, 1986) and is unsigned.

Petitioners' attorney advised them to stay out of the way, prepare a chronology and take photographs of their property leaving the scene, which they did. The confiscation

continued unabated under the supervision of Lockhart and Monteleone, despite the notation to lock the premises. Petitioners observed the confiscation and destruction of their property, prepared a daily chronology and took photographs as directed by their counsel. During the time the Petitioners were present, they saw much of their property being removed by others - some by named defendants, some by others whose identity is unknown. They also saw their property being destroyed and/or thrown into the creek adjacent to the property. During the time of Petitioners' observation, they noticed that much of the equipment in the garage building remained intact. Petitioners believe that Active is still operating the garage building using Petitioners' equipment.

Petitioners tried to obtain an inventory from Lockhart and/or Monteleone without success. Neither Petitioners nor their

counsel were able to obtain an inventory. Approximately 5 weeks after the confiscation, Petitioners were able to obtain copies of MV952s - Police request for removal of abandoned vehicle slips - for some of their vehicles from the Sheriff's Department. At that time Petitioners were also given an "inventory" which only listed junk tires and rusted parts.

Petitioner, Robert Kurz, Sr., went to Orthodox in early February, 1986 and requested the return of Petitioners' property. He was informed that he could only obtain the release of all of the motor vehicles (not some of the vehicles) upon payment of exorbitant towing and storage charges. Petitioner was also told that he had to sign a release for all the vehicles in "as in" condition, without prior inspection or knowing whether the tools, equipment, auto parts, etc. on the vehicles at the time of

the confiscation were still there. (During discovery, Petitioners learned that Orthodox had begun applying for titles to the vehicles as early as February 5, 1986.)

On March 4, 1986, Petitioner, Robert Kurz, Sr., went to the lease property with Harold Joseph, a professional photographer. Petitioner returned to the premises after being informed that the garage was in full operation and still using the name of Bob's Auto Repair. They observed and photographed unidentified persons working on a car inside the garage building which was elevated on a drive-on ramp owned by Petitioners. Defendant Steve Piccone, was seen parking sales cars in the front yard of the premises.

In August, 1986, Petitioners, Robert Kurz, Sr. and Robert Kurz, Jr. went to trial on the vandalism and other felony charges and received a demurrer.

Orthodox did file abandoned vehicle slips (MV 952)s with the Department of Transportation in Harrisburg and collected fees from the Commonwealth of Pennsylvania via the U.S. mail for 57 motor vehicles. U.S. v. Lebovitz, 669 F. 2d 897 (1982) says "The mail fraud statute prohibits the use of the mails for the purpose of a scheme to defraud." U.S. v. Adamo, 537 F. 2d 31, 36 (1976) states "It is enough that the use of the mails merely furthers the scheme." Orthodox began applying to the Commonwealth for the ownership rights of Petitioners' vehicles on February 5, 1986 - the first day of the confiscation - under the abandoned vehicle law bypassing the police department authorization.

The abandoned vehicle slips (MV952)s speak for themselves. The fraudulent misstatements include the authorization by the Philadelphia police department (either

Officer McCann, Captain Ballard or Officer Chalmers), the condition of the vehicle, the value of the vehicle, the contents (or lack thereof) and the altering of the serial numbers on some of the slips. These actions are criminal offenses punishable under criminal statutes. These fraudulent misstatements were done with the full intent to deprive Petitioners of their property.

Although Orthodox processed the abandoned vehicle slips for Petitioners' vehicles improperly (according to Officer McCann) they intermingled these slips with other abandoned vehicle slips legitimately obtained. State Farm Mutual Auto Insurance Co. v. David Rosenfield, et al, USDC #85-6746 (1988) states "it is only when the predicate acts are unrelated to the enterprise or the actors' association with it that the nexus element is missing and consequently there is not RICO."

Orthodox's applications to the Commonwealth for titles definitely did injure the Petitioners because these applications legally transferred ownership of Petitioners' vehicles to Orthodox to do whatever they wished. Of all of the defendants in this litigation, Orthodox and Active were the most aware of the value of Petitioners' vehicles, equipment, tools, auto parts, etc. because of the nature of their businesses.

In U.S. v. Boffa, 688 F.2d 919 (1982), the term "enterprise" is defined as not only legal entities such as partnerships, corporations, and associations, but also any group of individuals "associated in fact." 18 U.S.C. 1961(4). In Haroco v. American National Bank and Trust Company of Chicago,747 F.2d 384 (1984), the court stated "The unifying thread of RICO's legislative development was a desire to avoid creating loopholes for clever defendants and their

lawyers. In short, Congress chose to provide civil remedies for an enormous variety of conduct balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship." In Sedima S.P.R.L. v. Imrex Company, 473 US 479, 105 S.Ct. 3275, 87 L.Ed 2d 346 (1985), the court opined at length that "RICO is to be read broadly with a view toward activity which RICO was designed to deter and so be liberally construed to effectuate its' remedial purposes. We do not believe however that the notion of continuity compels a requirement of open-endedness."

Blumenthal v. U.S., 332 US 539, 559 (1947) states in part "the essential element of a chain conspiracy...is interdependency." The scheme must depend on the successful operation of each link of the chain but allows persons unknown to each other and never before in contact to be jointly

prosecuted as co-conspirators. The only important limitation on the chain conspiracy is that the chain must have "a common end or single unified purpose." U.S. v.Elliot, 571 F.2d 880 (5th Circuit 1978) states "a group of persons informally associated with the purpose of profiting from criminal activity." Since no financial records were provided by any of the defendants, Petitioners cannot confirm that all defendants profited by their association.

In Direct Sales v.U.S., 319 US at 714, 63 S. Ct. at 1270, the Supreme Court emphasized the need for circumstantial evidence stating "...the proof by the very nature of the crime must be circumstantial and inferential to an extent..." U.S. v. Klein, 515 F2d 751 states in part "...circumstantial evidence is clearly proper to show these elements, especially in a conspiracy case where direct evidence is

likely to be scant..." U.S. v. Outpost Development, 552 F2d 868 states in part "...defines a scheme to defraud includes any plan or course of action intended to deceive others and to obtain by false pretenses, representations or promises, money or property from persons so deceived..." "...the only essential elements of mail fraud are that a person devised a scheme to defraud and the purpose of executing that scheme the person used the mails or caused the mails to be used and that the use of the mails was foreseeable."

In Cincinnati Gas and Electric Company v. General Electric Company, 656 F. Supp. 49 (S D Ohio 1986) "To participate in the conduct of an enterprise's affairs within the meaning of RICO section 1962 (c) means to perform activities necessary or helpful to the operation of the enterprise whether directly or indirectly; violation does not

require defendants operation or management of the enterprise." 18 USCA section 1962(c)

In Superior Oil Co. v. Fulmer, 785 F. 2d 252, the court said "We reject the position that a RICO pattern must involve at least two distinct unlawful schemes" and in Sheerin v. E.F. Hutton, 885 F.2d 1162, the court stated RICO is to be read broadly "with a view toward activity which RICO was designed to deter" and so must be liberally construed to effectuate its remedial purpose. See Liquid Air Corp. v. Rogers, 834 F. 2d 1297 (7th Circuit 1987) "the repeated infliction of economic injury upon a single victim in a single scheme satisfies the pattern." All Petitioners have suffered economic injury as a result of the seizure of their property by defendants.

Barticheck v. Fidelity Union Bank, 832 F. 2d 36 (3rd Circuit 1987), the court said "We reject the view that racketeering acts

committed pursuant to a single scheme can constitute a RICO pattern only if a scheme is potentially ongoing or open ended."

Petitioners' former counsel chose the RICO venue, not Petitioners. Uncontested is the fact that Petitioners were deprived of their property and that defendants profited. Admissions in depositions by these defendants confirm that fact.

ARGUMENT

II. Whether there were genuine issues of material fact which should have been submitted to a jury as trier of fact? Whether Petitioners were prejudiced by Judge Kelly's interpretation of the evidence presented?

In his February 3, 1989 memorandum and order, Judge Kelly admits that the identity of the persons who ordered Orthodox to the property was unclear due to conflicting sworn testimony of all defendants on this questions. Petitioners definitely did not order Orthodox to the property. A jury should decide this issue.

Judge Kelly stated further that the process of application for salvor's certificate (MV954) forms by Orthodox for the vehicles towed from the premises was unclear. Petitioners cited numerous false representations on these applications completed by Orthodox and Bankhead, including the naming of Officers McCann, Chalmers or Captain Ballard as the authority for the execution of these applications and changing of vehicle identification numbers. Officer McCann denied at deposition authorizing the completion of these forms, or the abandoned vehicle slips (MV952)s. Bankhead admitted completing these forms. Since the process used is unclear to Judge Kelly, it should have been submitted to a jury for determination.

Orthodox has maintained that Petitioners' property was disposed of as scrap metal. Petitions have produced

advertisements from newspapers listing motor vehicles in the possession of Orthodox for sale at auctions and an advertisement from the Bell of Pennsylvania phone book, which boasts an 800 number and announces their used auto parts inventory. Since Orthodox has provided no documentation to support their absurd allegation that all of Petitioners' property was converted into scrap metal, a jury should decide the ultimate disposition of Petitioners' property.

Judge Kelly admitted that Petitioners submitted evidence to support an inference by a reasonable jury that on or after February 5, 1986, employees of Active and Orthodox, some of whom are defendants, sold Petitioners materials and retained the proceeds. Judge Kelly failed to address at all the theft of Petitioners' tools, equipment, auto parts and personal possessions which were also stolen by defendants. Judge Kelly stated that a

jury can find that the property was used for storage in March, 1986. A jury should decide if this property was used for storage (as the defendants contend) or as an operating garage which Petitioners documented with the submission of photographs taken by Harold Joseph in March, 1986. This garage remains in operation to the present day by Active and Altimari still works at Active.

State Farm Mutual Auto Insurance Company v. David Rosenfield, et al, USDC 85-6746 (1988) states "summary judgment that entitles the parties having the ultimate burden of proof to a recovery should be exercised only where the law and the facts are so clear that submission to a jury would be unnecessary." When defendants offer conflicting testimony, as in this case, it is up to a jury to resolve the conflicting testimony.

Petitioners have proven that Orthodox drivers, defendants Paul and Steve Piccone

have admitted to taking 57 motor vehicles and numerous straight-job truck loads of Petitioners' property, not "several incidents" as stated by Judge Kelly. Photographs were produced to the court along with deposition statements by defendants admitting same.

Under Pennsylvania law, Captain Haitsch testified, the tenant of a property is not responsible for towing and storage charges for thirty days following an eviction. These charges are the responsibility of the land-owner. Even Judge Kelly in his memorandum of May 29, 1987 cited Keystone Coal v. Williams, 216 PA 217, 65A 407, 408-09 (1907) "The delivery to the landowner of the premises recovered in the ejectment is no delivery in law of the personal property upon the premises. Such property with respect to its ownership remained as before."

Judge Kelly cites Orthodox's willingness to return the motor vehicles to Petitioners upon payment of towing and storage charges. He uses this illustration to support his opinion that Petitioners' vehicles were not stolen. He chooses to overlook the facts that Orthodox was notified both on and after February 5, 1986 that Petitioners vehicles and other property was illegally confiscated, that Bankhead began applying to the Commonwealth for title to the vehicles on February 5, 1986 and that Petitioner, Robert Kurz, Sr., tried to retrieve the vehicles and property within days of the confiscation but was told that only all of the vehicles would be released (not some of the vehicles), that a release for each individual vehicle had to be signed accepting the vehicles in "as is" condition and that towing and storage fees needed to be paid before any vehicle would be released. (Again no ransom was stated for

the return of the other property.) Judge Kelly also chooses to ignore the Pennsylvania landlord-tenant law and normal eviction procedure as stated by Captain Haitsch.

The uncontested facts remain that Petitioners' property was confiscated by defendants, none of whom Petitioners owed any money and that Petitioners were deprived of their property (or its value).

Judge Kelly refers to an oral argument which was held in this case. The hearing to which he refers occurred on January 11, 1989 and was scheduled solely for the purpose of discussing Mr. Blasdel's motion to withdraw as Petitioners' counsel. Mr. Blasdel's outrageous and self-serving statements, which were totally unsubstantiated, have been widely quoted not only by defense counsel but also by Judge Kelly in subsequent pleadings. Judge Kelly erred in permitting Mr. Blasdel, after his argument to withdraw "on the

advise of his counsel", to participate in oral argument regarding summary judgment motions by defense counsel. Petitioners were deprived of due process when Judge Kelly permitted Mr. Blasdel to argue as if he still represented the Petitioners. Judge Kelly further erred in permitting this argument without affording Petitioners an opportunity to secure counsel to represent their interests. For all intents and purposes, Mr. Blasdel stopped representing Petitioners' interests in December, 1988 when he withdrew as counsel in a related case (Kurz v. Carlin, USDC #87-7338). His withdrawal came on the third day of trial before Judge DeBois, "on advise of his counsel". Mr. Blasdel advised Judge DeBois that he was withdrawing as Petitioners' counsel in all cases.

Judge Kelly incorrectly assumed that the eviction proceeding was property litigated and therefore not subject to collateral

attack. This issue is not a collateral attack on the eviction (which was intentionally pushed through the motion court to deprive Petitioners' of a hearing), but the theft that resulted from the eviction proceedings. Petitioners produced documentation, including false affidavits filed by Noah Gorson, Esquire and defendant, Ellis Bolot, to support the illegal and improper abuse used to defraud Petitioners of their property.

The documents Petitioners produced prove that Judge Kelly's assumption that the defendants' only purpose was to acquire the property is incorrect. If the defendants' only purpose was to secure the property, then the Petitioners would not have been barred, under threat of arrest, from removing their property and the wholesale confiscation of their property would not have taken place.

57 motor vehicles belonging to various Petitioners were taken by some or all of the defendants. Each vehicle theft represents an individual predicate act, as well as an individual criminal offense under both Pennsylvania and US law. The personal property, tools, equipment, etc. also belonged to various Petitioners.

Judge Kelly states that the Active defendants aided in the removal of Petitioners' property. He further states that a jury could have inferred that these defendants simply aided the land owner in recovering possession of the property. Not addressed by Judge Kelly were the truckloads of auto parts and equipment taken to Orthodox's yard on Unruh Street. Also not supplied to Petitioners is the disposition of Petitioners' tools and equipment in the garage building, which appear to have never

left the premises and which today Active and Altimari continue to use.

Judge Kelly failed to answer Petitioners' questions as to how defendants can justify transporting some of Petitioners' property to scrap yards and keeping the proceeds, even though these same defendants acknowledged at deposition that they knew the property did not belong to them. Judge Kelly also refused to address the fact that Petitioners informed these defendants on and after February 5, 1986 that the theft of their property was illegal. See U.S. v. Klein, 515 F 2d 751 "A party who associates himself with an ongoing conspiracy may become a party to the agreement either expressly by agreement or implicitly by acts done in furtherance of that conspiracy."

Judge Kelly erred in applying the Marshall-Silver Construction Company, Inc. v. Mendel, 835 F 2d 63, 65 criterion in this

case for several reasons. Marshall-Silver was an involuntary bankruptcy that was forced upon the Plaintiff, a limited act against one Plaintiff. This case involves several coordinated acts against 6 Plaintiffs. We do not know if the Marshall-Silver defendants derived a financial benefit from the action; defendants in this case definitely reaped a financial benefits which is easily calculable with the help of photographs, trade journals and other reference material.

Liquid Air Corp. v. Rogers, 834 F 2d 1297 (7th circuit 1987) is a more appropriate standard for use in this case. Liquid Air Plaintiffs suffered a measurable financial loss as a result of intention fraud perpetrated by the defendants. There are 6 Petitioners in this action, all of whom suffered economic and other harm as a result of the defendants' actions.

Petitioners believe that all points which Judge Kelly found unclear or where he found a jury could infer a specific finding should be presented to a jury for decision. Petitioners believe they were deprived of due process by being denied a trial on the issues, then being assessed with bills for costs for the defendants.

On January 11, 1989, hearing was held before Judge Kelly regarding Mr. Blasdel's motion to withdraw as Petitioners' counsel. (Mr. Blasdel in fact ceased to represent Petitioners in December, 1988 as stated above.) Mr. Blasdel made wild and unsubstantiated claims regarding Petitioners, specifically Robert Kurz, Sr., Even if there was one scintilla of truth in Mr. Blasdel's statements (which there was not), the other 5 Petitioners were also adversely affected by Mr. Blasdel's actions. Petitioners believe that these self-serving and unsubstantiated

ravings of Mr. Blasdel influenced Judge Kelly to Petitioners' detriment. Instead of viewing the evidence presented in the light most favorable to Petitioners, Petitioners believe that Judge Kelly's interpretation was colored by the outrageous statements made by Mr. Blasdel. Judge Kelly quoted Mr. Blasdel's motion to withdraw extensively in his ruling regarding summary judgment. Defense counsel has also quoted Mr. Blasdel's statements ad nauseam in their appellant briefs.

ARGUMENT

III. Whether Petitioners' due process rights granted by the Fourth Amendment and Fourteenth Amendment were violated by the defendants?

The findings in this case by Judge Kelly are in direct contradiction with holdings made by the Supreme Court. Elmer J. Jonnet, et al v. Dollar Savings Bank of the City of New York, et al, 530 F. 2d 1123 (1976) states "Prevailing rule of procedural due process is

that official seizures can be constitutionally accomplished only with either notice and opportunity for hearing or other safeguard against mistaken taking." "The constitutional rule enunciated was that except in "extraordinary situations", notice and hearing must precede any deprivation of property." These circumstances are outlined as follows: "407 US at 90, 92 S.Ct. at 1983. These "truly unusual" situations said the Court, have three common characteristics: First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that

it was necessary and justified in the particular instance. 407 US at 91, 92 S. Ct. at 2000." Further Jonnet, supra continues "We infer from the current crop of Supreme Court decisions that the prevailing rule of procedural due process is that official seizures can be constitutionally accomplished only with either "notice and....opportunity for a hearing or other safeguard against mistaken" taking. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601, 606, 95 S. Ct. 719, 42 L.Ed. 2d 751 (1975).

Martin Graff, Jr., Individually and on behalf of all others similarly situated v. William J. Nicholl, etc., et al, 370 F. Supp. 974 (1974) also states "Fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of pendency of action and award them opportunity to present

their objections; the notice must be of such nature that it reasonably conveys the required information and must afford reasonable time of those interested to make their appearance, but if, with due regard for practicalities and peculiarities of case, those conditions are reasonably met, constitutional requirements are satisfied. U.S.C.A. Const. Amend. 14." Graff continues "Due process requires that hearing be conducted before one's motor vehicle is towed as abandoned property or, if vehicles in state of disrepair are towed immediately, after impoundment but before owner is required to pay any charges." Also cited in Graff, '"Due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions...' This quote is attributable to

Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 US 895, 82 S. Ct. at 1748 (1961). "The notice and opportunity to be heard must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 US 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). "Furthermore, the opportunity for a hearing must be given before the deprivation takes effect, unless exceptional circumstances justify postponement of the hearing until after the event." See e.g. Fuentes v. Shevin, 407 US at 81-82, 92 S.Ct. 1983. Citations for Armstrong and Fuentes were abstracted from Graff.

In Jordan, Mitchell, Inc. v. Berman and Pettit, USDC #89-8172 ED the court stated "A procedure which permits the attachment of a debtors' property without an opportunity to be heard as to the voluntariness of the waiver of prejudgment adjudication let alone

the underlying merits of the creditors' claim must at least comport with the due process requirements found to be applicable in cases involving judicially awarded judgments."

"No one may be legally divested of his property unless he is allowed hearing before impartial tribunal before which he may contest claim set up against him and be allowed to meet it on law and facts and show, if he can, that it is unfounded, but if reasonable opportunity for hearing is afforded person affected by proceeding, he has had due process." USCA Const. Amend. 14 Abbott v. Thetford, 354 F. Supp. 1280 (1973). "The purpose of a due process hearing is to safeguard from deprivation the liberty or property rights of protected persons, and this can only be done where the requisite hearing is held before the decision maker so that the decision maker can sift through the facts, weigh the evidence and reach the

appropriate conclusion." USCA Const. Amend. 5, Ponce v. Housing Authority of Tulare County, 389 F. Supp. 635 (1975).

42 U.S.C. § 1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress." The court reiterated the panel's conclusion that a conspiracy must be assumed on the state of the record and, therefore, that the case must be treated in its current posture "as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away." Edward Soldal, et ux v. Cook County, Illinois, et al 942 F. 2d 1073,

1075 (CA7 1991 - en banc). A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property." 466 U.S., at 113 (as quoted from Soldal).

Petitioners first learned of the seizure of their property upon their arrival at their leased premises on February 5, 1986 when the seizure was well underway. To this day, they have not had a hearing on this seizure.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT KURZ, SR., ET AL
PETITIONERS

v.

ANTHONY MAIRONE, ET AL

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1399

KURZ, ROBERT a/k/a KURZ, BOB SR.
KURZ ROSEMARY t/a BLUE LINE CAB
KURZ, ROBERT JR.
KURZ, SHAWN
KURZ, STEVEN
KURZ, MARGARET M.

v.

ANTHONY MAIRONE and
ANGELO ALTIMARI and
JOHN SCARCELLI; PAUL PICCONE; STEVEN PICCONE;
X. PICCONE, (a fictitious first name);
ELLIS BOLOT; PAT FINN; BARNEY FINN;
JOSEPH "Joe" FINN; JAMES "Jimmy" FINN;
WILLIAM "Bill" SMITH, (a fictitious last name);
JOHN DOE #1; JOHN DOE #2 and
ACTIVE AUTO SALES, INC. and
KUTNER BUICK, INC. and
GEORGE BROWN and
ORTHODOX AUTO COMPANY, INC.; JOHN BANKHEAD;
STEVEN SLIVAK; PERNELL ANDERSON; VINCENT RUFFLING;
JAMES ABEL; JOHN DOE #3 and JOHN DOE #4 and
MAXWELL GORSON, ESQ. and
GORSON AND GORSON and
BEN COHEN and JOHN DOE #5 and
DEPUTY SHERIFF JOHN LOCKHART and
DEPUTY SHERIFF ANTHONY MONTELEONE and
JOHN MAHER and
MICHAEL ROWE and JAMES SMITH, (unknown Individuals yet to be discovered and named)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann, Circuit Judge

Oct 08 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1399

KURZ, ROBERT a/k/a KURZ, BOB SR.
KURZ, ROSEMARY t/a BLUE LINE CAB
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name); JOHN DOE #1; JOHN DOE #2 and
ACTIVE AUTO SALES, INC. and
KUTNER BUICK, INC. and
GEORGE BROWN and
ORTHODOX AUTO COMPANY, INC.; JOHN BANKHEAD;
STEVEN SLIVAK; PERNELL ANDERSON; VINCENT
RUFFLING;
JAMES ABEL; JOHN DOE #3 and JOHN DOE #4 and
MAXWELL GORSON, ESQ. and
GORSON AND GORSON and
BEN COHEN and JOHN DOE #5 and
DEPUTY SHERIFF JOHN LOCKHART and
DEPUTY SHERIFF ANTHONY MONTELEONE and
JOHN MAHER and
MICHAEL ROWE and JAMES SMITH, (unknown
individuals yet to be discovered and named)

Robert Kurz, Sr., Robert Kurz, Jr.,
Rosemary Kurz, Steven Kurz, Shawn Kurz and
Margaret Kurz

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-05587)
District Judge: Honorable James McGirr Kelly

Submitted
September 2, 1992
Before: MANSMANN, COWEN and ALITO,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellants.

BY THE COURT,

Carol Los Mansmann,
Circuit Judge

Attest:

_____
Acting Chief Deputy
Clerk

Dated: 9-11-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KURZ, SR., et al	:	Civil Action
v.	:	
ANTHONY MAIRONE, ET AL	:	NO. 86-5587

ORDER

AND NOW, this 6th day of April, 1989, in consideration of plaintiffs' motion for reconsideration of the Order of February 3, 1989, the response of defendants Orthodox Auto Company, Inc., John Bankhead, Pernell Anderson, James Abel, Steven Slivak, Vincent Ruffling, Angelo Altimari, Ellis Bolot, John Scarcelli, Paul Piccone, Steven Piccone, and Active Auto Sales, Inc. thereto, it is ORDERED that plaintiff's motion is DENIED. This court advises the plaintiffs that the entry of summary judgment in favor of defendants on plaintiffs' federal claims and the dismissal of plaintiffs' pendent state claims does not prevent plaintiffs from

instituting an action in state court if their claims are not barred by the statute of limitations.

BY THE COURT:

_____

JAMES MCGIRR KELLY, J.

filed Apr 7 1989
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KURZ, SR., et al : Civil Action

v. :

ANTHONY MAIRONE, et al : NO. 86-5587

Filed Feb 3 1989

MEMORANDUM AND ORDER

J.M.KELLY, J. February 3, 1989

Presently before this court are the motions of fourteen defendants for summary judgment against the plaintiffs in this action brought pursuant to 18 U.S.C. § 1964(c), the civil damages provision of the Racketeer Influenced and Corrupt Organizations Act (RICO). The fourteen defendants are Angelo Altimari, Paul Piccone, Steven Piccone, Ellis Bolot, John Scarcelli, Active Auto Sales, Inc. (Active Auto), Kutner Buick, Inc. (Kutner Buick), George Brown, Orthodox Auto Company, Inc. (Orthodox Auto),

John Bankhead, Steven Slivak, Pernell Anderson, Vincent Ruffling, and James Abel. 1

1. By Order of this court dated October 25, 1988, the case against defendant Anthony Mairone was severed from the other defendants in this matter, and that part of the case was placed in civil suspense pending disposition of Mairone's bankruptcy proceedings.

Plaintiffs allege that they have suffered injuries to their business or property as a result of violations of 18 U.S.C. § 1962 (b), (c), and (d).

I. BACKGROUND

Plaintiffs commenced this action on September 23, 1986, and have amended their complaint three times. The fourteen defendants whose motions are presently before this court, organized into three groups represented by separate counsel, filed motions to dismiss the plaintiffs' third amended complaint, pursuant to Fed. R.Civ. P. 12(b)(6). One group of defendants requested

at oral argument that its motion be converted to a motion for summary judgment, and the other two groups subsequently filed motions for summary judgment while their motions to dismiss were outstanding. This court subsequently converted the motions to dismiss to motions for summary judgment by Order of December 7, 1988. Subsequently, counsel for plaintiffs petitioned this court for leave to withdraw from the representation of plaintiffs in this action, and after a hearing, I granted counsel's petition to withdraw by Order dated January 11, 1989. Subsequent to filing the petition to withdraw, and prior to the hearing and ruling on the petition, counsel for plaintiffs filed a brief response on behalf of plaintiffs to the three pending motions for summary judgment. The three groups of defendants filed responses in reply, and plaintiffs,

after their counsel was permitted to withdraw, and acting pro se, filed three supplemental memoranda, one in opposition to each motion for summary judgment submitted by the groups of defendants.

This court previously granted plaintiffs an extension of time in which to respond to defendants' motion for summary judgment; plaintiffs filed a responsive memorandum within that deadline. Plaintiffs' earliest supplemental memorandum in opposition, however, was filed twenty-seven days after the extended deadline. Additionally, pursuant to P 4 of the Pretrial and Trial Procedures before this court, no further briefing after a reply memorandum addressing issues first raised in the memorandum in opposition to the motion may be filed without express leave of the court. Nevertheless, in consideration of the grant of leave to

plaintiffs' counsel to withdraw, and the pro se nature of the plaintiffs' supplemental responses, I will consider, for purposes of resolving the present summary judgment motions of defendants, the arguments and evidentiary materials submitted by the plaintiffs in their supplemental responses in opposition.

Plaintiffs' RICO claims arise from the alleged eviction of Bob's Auto Repair, a business formerly operated by plaintiff Robert Kurz, Sr., from the premises at 4105 Kensington Avenue, Philadelphia, PA., and the alleged theft of plaintiffs' property during the course of that eviction. The plaintiffs have alleged that defendant Anthony Mairone acquired money through a pattern of extortion while a Philadelphia police officer, and then invested that money in the expansion of Active Auto, with the aid of defendants

Scarcelli, Altimari, Bolot, Brown and Kutner Buick. Plaintiffs further allege that Bob's Auto Repair, located on the property next to Active Auto, stood in the way of the expansion of the racketeering enterprise which included all the defendants and was led by Mairone. Consequently, plaintiffs allege, all of the fourteen defendants whose motions are presently before the court participated, as part of the enterprise, in the seizure of Bob's Auto Repair and the theft or destruction of the plaintiffs' personal property located on the premises.

The following facts are not disputed by the parties to this action. Pursuant to a lease agreement between Robert Kurz and defendant Altimari, the garage and lot located at 4105 Kensington Avenue in Philadelphia were leased to Kurz beginning June 1, 1984. On the leased property Kurz

opened a business known as Bob's Auto Repair. The property, as well as an adjacent parcel of land at 4101-03 Kensington Avenue, was owned by Altimari, his son-in-law Anthony Mairone, and their spouses. The adjacent parcel of land was leased to Active Auto, which, at the times relevant to this action, did business at that address as a used car outlet.

Defendants P. Piccone, S. Piccone, Altimari, and Bolot were employed by Active Auto at the times relevant to this action. Scarcelli was president of Active Auto. At the relevant times, Kutner Buick was a corporation doing business in Philadelphia as a seller of new and used cars, and George Brown was employed as used car manager for Kutner Buick. Bankhead, Slivak,Anderson, Ruffling, and Abel were employed by Orthodox

Auto, a corporation doing business in Philadelphia, at the relevant times.

Pursuant to proceedings in ejectment in the Court of Common Pleas of Philadelphia County, an order was entered on January 10, 1986 requiring Robert Kurz, Sr. to vacate the leased premises by January 31, 1986 or to pay a $1,000 penalty. Altimari v. Kurz, No. 165 Sept. 1985 Term (C.P. Phila. County Jan. 10, 1986). Two deputy sheriffs for the County and City of Philadelphia entered the premises of 4105 Kensington Avenue on February 5, 1986 to execute the writ of possession issued by the Court of Common Pleas of Philadelphia County, and continued after February 5, 1986 to oversee the removal of property not belonging to the owners of the premises, so that possession could be returned to the owners.

Orthodox Auto employees entered the premises of Bob's Auto Repair on February 5, 1986 and for a few day thereafter, and towed vehicles from the premises. Orthodox Auto subsequently submitted applications for certificates of salvage to the Pennsylvania Department of Motor Vehicles (DMV) for certain vehicles towed from the premises of Bob's Auto Repair, and received payment for the vehicles for which the DMV issued salvage certificates. Additionally, defendants Mairone, Scarcelli, Altimari, P.Piccone, S.Piccone, Bolot and Active Auto by its agents, entered the premises of Bob's Auto Repair on February 5, 1986, and on that date Anthony Mairone took possession of the premises of Bob's Auto Repair.

II. **DISCUSSION**

Plaintiffs have alleged that certain of the fourteen defendants violated section

1962(d) by conspiring to violate section 1962(a) through aiding Mairone in the investment of his racketeering income in the operation of Active Auto and the purchase and sale of motor vehicles. This group of defendants includes Scarcelli, Altimari, Bolot, Active Auto, Brown, and Kutner Buick. Plaintiffs further allege that Mairone conspired with Scarcelli, Altimari and Bolot to seize Bob's Auto Repair, thereby violating section 1962(d) by conspiring to violate section 1962(b).

Plaintiffs allege that certain of the defendants violated section 1962 (b) and (c), by seizing Bob's Auto Repair and participating in the theft of the plaintiffs' personal property through a pattern of racketeering activity. This group of defendants includes Scarcelli, Altimari, Bolot, Active Auto, S. Piccone, P. Piccone,

Brown, Kutner Buick, Orthodox Auto, Bankhead, Slivak, Anderson, Ruffling, and Abel.

Section 1962 provides in relevant part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from the pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity of collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1982) (footnote omitted.)

The defendants alleged to have violated sections 1962(b) and (c) have asserted several grounds in support of their motions for summary judgment. Orthodox Auto, Bankhead, Slivak, Anderson, Ruffling and Abel (collectively Orthodox defendants) have asserted that there is no evidence demonstrating a nexus between the activities of the Orthodox defendants in disposing of the towed vehicles and the activities of the other defendants alleged to be members of the enterprise for section 1962(d) purposes. Additionally, the Orthodox defendants contend there is insufficient evidence of a section 1962(c) enterprise. The Orthodox defendants further assert that plaintiffs have produced no evidence which demonstrates that the

defendants engaged in a pattern of racketeering activity, an essential element for a violation of either section 1962(b) or (c). The Orthodox defendants assert that the plaintiffs have pointed to no evidence that the defendants acquired or maintained control of or an interest in Bob's Auto Repair, the enterprise alleged for section 1962(b) purposes.

Kutner Buick and George Brown (collectively Kutner defendants) adopt the arguments of the Orthodox defendants, and, additionally, contest the allegations of plaintiffs against the Kutner defendants. The Kutner defendants have attached affidavits stating that George Brown was not present on the premises of Bob's Auto Repair on February 5, 1986, as alleged by plaintiffs, and that he died not rummage through papers on those premises that day.

The affidavits also state that Kutner Buick did sell used cars to Active Auto, among other dealers. The Kutner defendants assert that even assuming the contested allegations were true, those acts are not sufficient evidence from which a jury could reasonably find that the Kutner defendants violated section 1962(b),(c), and (d).

Altimari, P.Piccone, S. Piccone, Bolot, Scarcelli and Active Auto (Active defendants adopt the arguments of the Orthodox defendants, and contend that plaintiffs have failed to point to any evidence from which a jury could reasonably find that the Active defendants violated section 1962(b), (c) and (d).

Altimari, P.Piccone, S. Piccone, Bolot, Scarcelli and Active Auto (Active defendants) adopt the arguments of the Orthodox defendants, and contend that plaintiffs have

failed to point to any evidence from which a jury could reasonably find that the Active defendants violated section 1962(b), (c) and (d). The Active defendants contend that the analysis in this court's Memorandum and Order of December 22, 1988, granting the motions of John Lockhart and Anthony Monteleone for summary judgment against the plaintiffs, is applicable to the motions currently before the court.

Under Fed. R.Civ. P. 56 (c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to

determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. Id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial." Celotex Corp. v.Catrett, 477 U.S. 317, 322, 323 (1986).

A. **Pattern of Racketeering Activity**

The requirement of a pattern of racketeering activity is an essential element for a violation of either section 1962(b) or (c). A person must acquire or maintain an interest in or control of an enterprise through such a pattern in order to violate 1962(b). A person must conduct or participate in the conduct of the affairs of an enterprise through such a pattern in order to violate section 1962(c).

The moving defendants have met their initial burden of pointing out to the court the portions of the record which demonstrate the absence of sufficient evidence from which a jury could reasonably infer that the defendants engaged in acts which constituted a pattern of racketeering activity. The

defendants have attached to their motions portions of deposition transcripts which point out a lack of evidence demonstrating continuity and relationship between the acts of the various defendants alleged by plaintiffs to have occurred on or after February 5, 1986 either on the premises of Bob's Auto Repair or in disposing of the personal property of the plaintiffs taken from those premises. Movants have pointed out that the plaintiffs produced virtually no evidence, as of the time of the motions, of the commission of any predicate acts by defendants which form a pattern of racketeering activity.

In evaluating the response of the plaintiffs, this court must apply the case analysis of the pattern requirement set forth by the Third Circuit in Barticheck v. Fidelity Union Bank/First National State, 832

F.2d 36, 39 (3d Cir. 1987). In Barticheck, the court held that the existence of a pattern which satisfied the requisite elements of continuity plus relationship set forth by the Supreme Court in Sedima,S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n. 14 (1985), depends on a combination of factors, including (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. See Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 676-77 (3d Cir. 1988) (citing Barticheck).

Plaintiffs have pointed to affirmative evidentiary materials attached to their supplemental responses, in the form of excerpts from deposition transcripts, letters, advertisements and other exhibits.

Viewing this evidence in the light most favorable to plaintiffs, and drawing all reasonable inferences in the plaintiffs' favor, I conclude that the evidence is sufficient for a jury to reasonably find the following facts material to the issue of whether defendants engaged in a pattern of racketeering activity. A jury could find that the identity of the person who ordered the Orthodox defendants to tow vehicles from the premises of Bob's Auto Repair is unclear. Moreover, the process of application for salvage certificates utilized by Orthodox Auto for the vehicles towed from the premises is also unclear. Viewing the evidence submitted in the light most favorable to plaintiffs, a jury could find that Orthodox Auto submitted applications for salvage certificates for abandoned vehicles when the

vehicles had not been certified by police as abandoned.

Additionally, a jury could find that Orthodox Auto disposed of vehicles and parts that were towed from the Bob's Auto Repair lot as scrap metal, and retained the proceeds. Sufficient evidence has been presented to demonstrate that Orthodox Auto employee Bankhead knew that plaintiffs claimed the property as theirs, and nonetheless disposed of the property as scrap when plaintiffs did not pay the requested fees for towing and storage. Evidence submitted by plaintiffs also supports an inference by a reasonable jury that on or after February 5, 1986, employees of Active Auto, some of whom are defendants, removed vehicle parts from the premises, sold these materials for scrap value and retained the proceeds. Additionally, a jury could find

that Active Auto used the property for storage in March of 1986.

Another aspect of plaintiffs' RICO claim is the allegation that Active Auto and Kutner Buick were part of an enterprise led by Mairone. Evidence submitted by plaintiffs does demonstrate that Kutner Buick sold approximately one thousand used cars to Active Auto over a period of at least three years, and that several employees of Active Auto, namely Bolot, Scarcelli, and P. Piccone, previously worked at Kutner Buick. However, there is insufficient evidence from which a reasonable jury could infer that Kutner Buick was engaged in used car sales transactions with Mairone, the alleged leader of the enterprise.

Plaintiffs have also attached photographs which they claim show George Brown, used car manager of Kutner Buick,

walking on the premises of Bob's Auto Repair. Robert Kurz, Sr. has attached an affidavit in which he states that all the facts in the supplemental response are true. Viewing the evidence most favorably to plaintiffs, and assuming some basis of personal knowledge by the plaintiffs of the identity of George Brown, at most an inference that Brown came onto the premises at some time during or after the eviction is warranted. Plaintiffs have not produced any evidence that demonstrates that Brown was involved in removing property from the premises or that he was on the premises for any reason other than legitimate business purposes, in light of plaintiffs' evidence that Kutner Buick engaged in used car transactions with Active Auto, which began using the premises at 4105 Kensington Avenue for storage purposes.

Under the Barticheck analysis, plaintiffs have failed to demonstrate the existence of a pattern of racketeering activity. Plaintiffs have not demonstrated that the process of application for salvage certificates utilized by Orthodox Auto involved mailings made for the purpose of a scheme to defraud. Plaintiffs have not pointed to sufficient evidence of how many salvage certificate forms were filled out, or that Bankhead, acting for Orthodox Auto, had any specific intent to defraud either the plaintiffs or the Commonwealth of Pennsylvania, or that Bankhead made any material misstatements of fact in reckless disregard of the facts. See United States v. Boyer, 694 F. 2d 58 (3d Cir. 1982). Plaintiffs' evidence at best demonstrates that the process for dealing with vehicles towed pursuant to a writ of eviction was

unclear to Bankhead, and that he notified the Philadelphia Police Department of the towing of the vehicles in the manner he customarily used. Plaintiffs' evidence further demonstrates Bankhead's reliance on a deputy sheriff's explanation of the process of removal and storage, and negates rather than supports an inference of a fraudulent scheme. Plaintiffs have thus not sufficiently demonstrated the commission of predicate acts of mail fraud. 2

2. Plaintiffs have additionally failed to demonstrate that the alleged acts of mail fraud, which counsel for plaintiffs described at oral argument as tangential, caused them any injury, or that the activity had a nexus with the affairs of the alleged RICO enterprise. See State Farm Mutual Auto Ins. Co. v. Rosenfield, 683 F. Supp. 106, 109-11 (E.D. Pa. 1988) (construing injury and nexus requirements).

Plaintiffs' evidence demonstrates several instances of the disposal for scrap value of parts and vehicles from the premises by employees of Active Auto and Orthodox

Auto. Plaintiffs allege that this activity violated 18 U.S.C. 2312-12, which prohibits the interstate transportation or sale of stolen motor vehicles. Plaintiffs' evidence warrants a finding that the Active and Orthodox defendants sold used vehicle parts taken from the premises of Bob's Auto Repair to local scrap dealers. This evidence does not demonstrate that the defendants transported vehicles, which they knew were stolen, in interstate commerce or across state lines.

Plaintiffs' evidence does demonstrate the sale of vehicles by Orthodox Auto to local scrap dealers. Mr. Kurz, Sr., however, in deposition testimony attached to the motion of Orthodox defendants, stated that Orthodox Auto offered to return the vehicles he claimed were his upon payment of a towing and storage fee. Plaintiffs have not

demonstrated evidence which warrants a finding of defendants' knowledge that the vehicles were stolen, or that they were sold or transported in interstate commerce or across state lines by defendants. I conclude that plaintiffs have not pointed to sufficient evidence to demonstrate the commission of acts of interstate transportation or sale of stolen motor vehicles.

Even assuming that plaintiffs had sufficiently demonstrated the commission of several predicate acts, no finding of a pattern of racketeering activity would be warranted. The Third Circuit has stated, in a case conceded to be relevant to the instant facts by counsel for the plaintiffs at oral argument before this court, that "[t]he target of the RICO statute, as its name suggests, is criminal activity that, because

of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." Marshall-Silver Construction Co.,Inc. v. Mendel, 835 F.2d 63, 66-67 (3d Cir. 1987). As in Marshall-Silver, the activity in this case involves one victim and one injury, the loss of the property located at the premises of Bob's Auto Repair and the closing of the business operated at that location by Robert Kurz, Sr.

Plaintiffs have not pointed to any evidence which demonstrates that the property taken from the premises was anything but property accumulated and held by Bob's Auto Repair, a business operated by Robert Kurz, Sr. The eviction of Bob's Auto Repair and the removal of the property from the premises. While the used vehicles and parts may have been held for some months, and

disposed of in more than one load shipped to a scrap dealer, only 2 active perpetrators, Active Auto and Orthodox Auto acting through their respective employees, can be considered part of the alleged scheme pursuant to the evidence submitted by the plaintiffs. Moreover, the character of the activity involved here is a factor which weighs against the finding of a pattern. Plaintiffs have not pointed to any evidence which demonstrates any objective other than the eviction of Bob's Auto Repair and removal of the used parts and vehicles on the premises in order to regain possession pursuant to a valid state court judgment of ejectment which this court has held is not subject to collateral attack.

While plaintiffs may have a claim for a violation of state law against certain defendants for disposal of property taken

pursuant to the writ of possession, an issue which need not be decided here, "[t]his is not criminal activity with the continuity of which [the court] spoke in Barticheck." Marshall-Silver, 835 F.2d at 67. Marshall-Silver is controlling on the pattern issue in this case. Plaintiffs' failure to make a showing sufficient to establish a pattern of racketeering activity, an element essential to their claims for relief due to injuries suffered as a result of violations of section 1962 (b) and (c), requires that the defendants' motions for summary judgment against plaintiffs on those claims be granted. 3

3. Plaintiffs' claims of violation of section 1962(b) and (c) suffer from additional deficiencies. First, plaintiffs have failed to point to sufficient evidence from which a jury could find that the fourteen defendants acquired or maintained an interest in or control of Bob's Auto Repair, the enterprise alleged for purposes of the section 1962(b) claim. A plaintiff must show the acquisition or maintenance of an interest

in or control of the enterprise, not simply control of property or funds of the enterprise. See P.M.F. Services, Inc. v. Grady, 681 F. Supp. 549 (N.D. Ill. 1988). Second, plaintiffs have failed to point to sufficient evidentiary materials of record to establish a genuine issue of fact regarding the existence of the enterprise alleged for purposes of section 1962(c), "an association in fact which revolved around Defendant Mairone and include [sic] within it all of the Defendants." Plaintiffs' RICO Case Statement at 26. Viewing the evidence in the light most favorable to plaintiffs, a reasonable jury could not find (1) the existence of an ongoing organization with an operational or decisional framework; (2) the functioning of members of associates of the enterprise as a unit and with certain duties; and (3) the separate existence of the enterprise apart from the pattern of activity engaged in by the enterprise. Therefore, plaintiffs have failed to meet their burden of establishing the essential elements of a section 1962(c) enterprise. See Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 789-790 (3d Cir. 1984) (citing United States v. Riccobene, 709 F.2d 214, 221-24 (3d Cir.), cert. denied, 464 U.S. 849 (1983)), cert denied, 469 U.S. 1211 (1985).

B. RICO Conspiracy

Plaintiffs have alleged that the Active defendants and the Kutner defendants conspired to violate section 1962(a) by aiding Mairone in his investment in the

operation of Active Auto and Kutner Buick, enterprises affecting interstate commerce, of income Mairone derived from a pattern of racketeering activity. Plaintiffs have failed to point to evidence from which a jury could find that the defendants agreed with Mairone to commit the substantive offense of violating section 1962(a). See United States v. Ciancaglini, 858 F.2d 923, 927 (3d Cir. 1988) (agreement constitutes crime of conspiracy, not overt acts). At most, the evidence demonstrates that Mairone was found guilty of multiple counts of extortion pursuant to 18 U.S.C. § 1951 by a jury in 1987; that he invested approximately twelve hundred dollars in cash in the purchase of the property at 4101-07 Kensington Avenue with his father-in-law, Altimari, that Altimari leased the space to Active Auto and sold cars from Active Auto; and that Kutner

Buick sold approximately one thousand cars to Active Auto over at least a three year period. Plaintiffs have pointed to no evidence which demonstrates that Mairone invested any money derived from a pattern of racketeering activity in the operation of either Active Auto or Kutner Buick, nor have they pointed to any evidence that the Active defendants or Kutner defendants agreed to aid Mairone in such an activity.

Moreover, plaintiffs have pointed to no evidence that the Active defendants and Kutner defendants themselves derived income from participating in a pattern of racketeering activity and agreed with Mairone to invest that income in Active Auto or Kutner Buick. Absent evidence that defendants are persons who have received income derived from a pattern of racketeering activity in which that person participated as

a principal or as an aider and abettor, the statutory language defining a violation of section 1962(a) is inapplicable to the defendants, and they are incapable of violating or agreeing to violate that provision. See 18 U.S.C. § 1962(a).

Aiding and abetting liability may be imposed for a violation of section 1962 (a) on persons who have not committed acts which constitute a pattern of racketeering activity. See United States v. Wyatt, 807 F.2d 1480, 1482 (9th Cir.), cert. denied, 108 S.Ct. 170 (1987). Plaintiffs, however, have failed to demonstrate not only the requisite knowing participation and substantial assistance by defendants in a venture with Mairone involving investment of his alleged racketeering income, but also have failed to point to any evidence of defendants' desire that such a crime be accomplished. See

United States v. Waller, 607 F.2d 49, 51-52 (3d Cir. 1979); United States v. Newman, 490 F.2d 139, 143 (3d Cir. 1974); Odesser v. Continental Bank, 676 F. Supp. 1305, 1313 (E.D. Pa. 1987). Therefore, defendants' motions for summary judgment against plaintiffs on this claim under section 1962(d) will be granted.

Plaintiffs additionally allege that certain of the Active defendants (Scarcelli, Altimari and Bolot) violated section 1962(d) by conspiring to seize Bob's Auto Repair in violation of section 1962(b). Plaintiffs have failed to demonstrate sufficient evidence to warrant a finding that these defendants agreed to commit predicate acts forming a pattern of racketeering activity or a finding that defendants knew that the acts were part of a pattern of racketeering activity conducted so as to violate section

1962(b). See Odesser, 676 F.Supp. at 1312=13 (stating requirements for claim under section 1962(d)) (citing Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 792 n.8 (3d Cir. 1984), cert. denied, 679 U.S. 1211 (1985)).

At most, plaintiffs' evidence demonstrates that certain of the Active defendants aided in the removal of some of plaintiffs' property from the premises of Bob's Auto Repair during the eviction process. A jury could infer that Altimari and Mairone initiated the process of ejectment and the enforcement of the writ of possession,and asked the other Active defendants to assist in clearing the premises of plaintiff's property to facilitate the recovery of possession of the premises by the co-owners. Even assuming that this circumstantial evidence is sufficient to

demonstrate an agreement to commit the acts, plaintiffs have failed to demonstrate that this activity constitutes a series of predicate acts forming a RICO pattern.

Moreover, this court has held that there is insufficient evidence of record to warrant a finding that the persons alleged to constitute the section 1962(c) enterprise in this case engaged in a pattern of racketeering activity. Therefore, it is clear that the evidence of record fails to support a finding of knowing agreement by the Active defendants in furtherance of a pattern of racketeering activity conducted to seize Bob's Auto Repair in violation of section 1962(b). Thus, even assuming that a finding of an agreement to remove some of plaintiffs' property from the premises is warranted by the record, and even assuming arguendo that those acts constituted predicate acts of

racketeering activity under section 1961(1), the plaintiffs' failure to establish that the acts were part of a pattern of racketeering activity and that the Active defendants agreed to the acts knowing they were part of a pattern having as its aim the seizure of Bob's Auto Repair in violation of section 1962(b) dooms the plaintiffs' claim of a section 1962(d) conspiracy to violate section 1962(b). Therefore, the Active defendants' motion for summary judgment against plaintiffs on this claim will be granted.

III. CONCLUSION

The motions of the fourteen defendants for summary judgment against the plaintiffs on the plaintiffs' claims for injuries suffered as a result of violations of section 1962(b), (c) and (d) will be granted. [4] Since the federal cause of action against these defendants is dismissed, plaintiffs'

pendent state claims against the fourteen defendants whose motions are presently before this court shall also be dismissed. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

An order follows.

4. At oral argument before this court, counsel for the Active defendants agreed that if the plaintiffs' claims against the Active defendants were dismissed, defendant Altimari would dismiss the counterclaim asserted against Robert Kurz, Sr., in the Active defendants' answer to plaintiffs' third amended complaint. Because the Active defendants' motion for summary judgment against plaintiffs on plaintiffs' claims will be granted, Altimari's counterclaim against Kurz, Sr. will be dismissed pursuant to the representation of counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KURZ, SR., et al	:	Civil Action
v.	:	
ANTHONY MAIRONE, et al	:	NO. 86-5587

ORDER

AND NOW, this 3rd day of February 1989, upon consideration of the motions of defendants Angelo Altimari, Paul Piccone, Steven Piccone, Ellis Bolot, John Scarcelli, Active Auto Sales, Inc., Kutner Buick, Inc., George Brown, Orthodox Auto Company, Inc., John Bankhead, Steven Slivak, Pernell Anderson, Vincent Ruffling, and James Abel for summary judgment against the plaintiffs, plaintiffs' response thereto, and the oral argument and memoranda of the parties, and for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. Defendants' motions for summary judgment against plaintiffs on plaintiffs' claims are GRANTED.

2. Judgment is ENTERED in favor of defendants Angelo Altimari, Paul Piccone, Steven Piccone, Ellis Bolot, John Scarcelli, Active Auto Sales, Inc., Kutner Buick, Inc., George Brown, Orthodox Auto Company, Inc., John Bankhead, Steven Slivak, Pernell Anderson, Vincent Ruffling, and James Abel and against plaintiffs Robert Kurz, Sr., Rosemary Kurz t/a Blue Line Cab, Robert Kurz, Jr., Shawn Kurz, Steven Kurz, and Margaret Kurz.

3. Defendant Altimari's counterclaim against plaintiff Robert Kurz, Sr. is DISMISSED.

BY THE COURT:

JAMES MCGIRR KELLY,J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KURZ, SR. et al	:	Civil Action
v.	:	
ANTHONY MAIRONE, et al	:	NO. 86-5587

MEMORANDUM AND ORDER

J.M. KELLY, JR. December 22, 1988

Presently before this court is the motion of defendants JOhn Lockhart and Anthony Monteleone for summary judgment against plaintiffs on the plaintiffs' claim under 18 U.S.C. § 1964(c), the civil damages provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), for injuries suffered as a result of violations of 18 U.S.C. § 1962(b), (c) and (d). 1

1. Subsequent to the filing of the motion for summary judgment by Lockhart and Monteleone, the remaining defendants in this action have moved for summary judgment in three separate motions. Plaintiffs failed to timely respond to those motions, and I granted plaintiffs an additional ten days in which to respond in an order dated December

7, 1988. Plaintiffs' counsel subsequently petitioned this court for leave to withdraw as counsel for the plaintiffs, and had additionally requested that all proceedings, including the filing of responses to the three summary judgment motions, be stayed pending the consideration of the petition.

Prior to counsel's petition for leave to withdraw, the plaintiffs filed a memorandum in opposition to Lockhart and Monteleone's motion for summary judgment, and counsel for the plaintiffs and for Lockhart and Monteleone contested the motion at oral argument before this court. Therefore, the motion of Lockhart and Monteleone for summary judgment against the plaintiffs may be properly resolved notwithstanding counsel's pending petition for leave to withdraw.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to

determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 828 (1986).

Plaintiffs have alleged that both Lockhart and Monteleone, who are Deputy

Sheriffs of the City and County of Philadelphia, violated section 1962(b) and (c) by participating or aiding in the theft of the plaintiffs' property and the seizure of Bob's Auto Repair beginning on February 5, 1986. Plaintiffs further allege that Lockhart made a phone call on November 20, 1985 which was intended to coerce the plaintiffs into relinquishing control of Bob's Auto Repair and which resulted in the arrest of several of the plaintiffs, and thereby violated section 1962(c) and (d).

Section 1962 provides in relevant part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § (1982) (footnote omitted).

Sections 1962(b) and (c) each proscribe certain actions engaged in through a pattern of racketeering activity or collection of an unlawful debt. The requirement of a pattern of racketeering activity is thus a common element essential to any violation of either of these two subsections. Section 1961(5) of RICO sets out the statutory definition of this element, which requires "at least two acts of racketeering activity"; the definition of racketeering activity includes numerous acts indictable under various provisions of federal law or certain acts chargeable under state law and punishable by

more that one year of imprisonment. See 18 U.S.C. § 1961(1),(5) (1982 & Supp. III 1985).

The pattern requirement of civil RICO has been subject to varying interpretations by the federal courts after the Supreme Court's reference to pattern in a footnote in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985). The Third Circuit subsequently held that a determination of whether a pattern has been alleged depends on a combination of factors, including (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. See Saporito v. Combustion Engineering, Inc., 843 F.2d 666,676-77 (3d Cir. 1988) (citing Barticheck v. Fidelity Union Bank/First

National State, 832 F.2d 36, 39 (3d Cir. 1987).

This motion presents the issue of the application of the RICO pattern requirement to individual defendants in the context of a motion for summary judgment by less than all of the defendants alleged to have engaged in the pattern of racketeering activity. It is unclear whether the Barticheck combination of factors analysis of the extent of racketeering activity necessary to allege a pattern under civil RICO is directly applicable to the issue of whether each defendant has engaged in the activities proscribed by sections 1962(b) and (c) through such a pattern. However, under even the statutory minimum requirements of RICO, plaintiffs have failed to point to evidence from which a reasonable jury could find that

Lockhart or Monteleone violated section 1962(b) or (c).

Prior to Barticheck, the Third Circuit held that if all of RICO's other requirements were met, an aider and abettor of two predicate acts could be civilly liable under RICO. Petro-Tech, Inc. v. Western Co. of North America, 848 F.2d 1349, 1356 (3d Cir. 1987). If an aider and abettor of two predicate acts of racketeering activity can be civilly liable under RICO, the a fortiori one who commits two such acts as a principal can similarly be liable. This requirement of at least two predicate acts is the statutory minimum requirement for a pattern, less than the Barticheck combination of factors test which has been applied to the analysis of the sufficiency of a complaint as a whole.

Plaintiffs have failed to point to sufficient evidence from which a reasonable

jury could find that Lockhart or Monteleone either committed two predicate acts of racketeering activity or aided and abetted the commission of two such predicate acts.

Lockhart and Monteleone have admitted that they were present on the premises of Bob's Auto Repair, located at 4105 Kensington Avenue, Philadelphia, Pennsylvania on February 5, 1986 to execute a writ of possession issued by the Court of Common Pleas of Philadelphia County. Plaintiffs allege that the writ was defective, and that Lockhart and Monteleone acted without authority.

In their motion for summary judgment, Lockhart and Monteleone argue that they were acting lawfully in executing the writ of possession, and are absolutely immune from RICO liability, and further, that they engaged in no racketeering activity or

pattern of racketeering activity as defined by RICO. Lockhart and Monteleone have submitted, as exhibits attached to their motion, excerpts of their own depositions and of depositions of various individuals who have knowledge of the February 5, 1986 execution of the writ, in which the deponents have stated that there was no connection between Lockhart and Monteleone and any of the other defendants in this action, and that Lockhart and Monteleone had no knowledge of or connection with the disposition of plaintiffs' personal and business property after the execution of the writ in February of 1986.

Lockhart and Monteleone have stated, in testimony from their depositions attached as Exhibits A and B to the motion for summary judgment, that they were present merely to execute the writ of possession, and had no

knowledge of the disposition of the plaintiffs' property once it was removed from the premises at 4105 Kensington Avenue, and that neither of them benefitted from the transaction. Additionally, plaintiff Rosemary Kurz' deposition testimony, attached as Exhibit E to Lockhart and Monteleone's motion for summary judgment, corroborates the statement of Lockhart and Monteleone that they did not personally remove or take possession of any of the plaintiffs' property during the eviction process.

Plaintiffs rely heavily on an admission by Lockhart and Monteleone in their answer to the plaintiffs' second amended complaint, in which Lockhart and Monteleone admitted that Monteleone advised some of the plaintiffs on February 5, 1986 that the motor vehicles, parts and equipment that were on the leased premises were confiscated. Plaintiffs allege

that the activities of Lockhart and Monteleone in executing the writ of possession violated 18 U.S.C. § 1951-1952 and 18 U.S.C. § 2312-2313, and thus constituted predicate acts of racketeering activity. The essential thrust of plaintiffs' allegation of Lockhart & Monteleone's unlawful activity is that Lockhart & Monteleone facilitated the removal of plaintiffs' property from the premises of 4105 Kensington Avenue through exploitation of their official status, including threats of arrest if plaintiffs interfered with the removal of the property by other defendants.

18 U.S.C. § 1951-1952, which prohibit obstruction of commerce, require general criminal intent as an essential element of a violation. See United States v. Furey, 491 F. Supp. 1048, 1061 (E.D. Pa.), aff'd, 636 F.2d 1311 (3d Cir. 1980), cert. denied, 451

U.S. 913 (1981). Plaintiffs have alleged that Lockhart & Monteleone used threats of arrest to aid the other defendants in the theft of plaintiffs' property, and thus violated 18 U.S.C. § 1951. Section 1951 prohibits obstruction of commerce through robbery or extortion. Because plaintiffs have pointed to absolutely no evidence of threats of force or violence by Lockhart & Monteleone, the sole potentially applicable provision is extortion under color of official right See 18 U.S.C. § 1951(a), (b)(2).

Plaintiffs, however, have pointed to no evidence that Lockhart & Monteleone had the requisite intent to wrongfully exploit their office to induce plaintiffs to part with their personal property. See United States v. Price, 617 F.2d 455, 459 (7th Cir. 1979); United States v. Mazzei, 521 F.2d 639, 645

(3d Cir.), cert. denied. 423 U.S. 1014 (1975) The evidence pointed to by plaintiffs, that Lockhart & Monteleone admitted being on the premises to enforce the writ of possession that Monteleone advised plaintiffs that their property was confiscated during this enforcement, is not sufficient evidence from which a reasonable jury could infer that Lockhart and Monteleone had the requisite intent to wrongfully exploit their office. 2

2. Plaintiffs contend that the writ of possession upon which Lockhart and Monteleone relied had expired prior to February 5, 1986. Nevertheless, plaintiffs have not pointed to any evidence whatsoever which demonstrates that Lockhart and Monteleone knew the writ had expired; in fact, whether the writ had expired is a technical question of state law which was vigorously contested by counsel for Lockhart and Monteleone and counsel for plaintiffs at oral argument on this motion. The alleged expiration of the writ, an issue which this court need not decide, is not probative evidence of Lockhart and Monteleone's intent to wrongfully exploit their office, without more.

Plaintiffs alternatively allege that Lockhart and Monteleone committed a predicate

act by aiding in the interstate transportation or sale of stolen vehicles, a violation of 18 U.S.C. § 2312-2313. Plaintiffs have pointed to no evidence that Lockhart and Monteleone engaged in such acts as principals. Additionally, an aiding and abetting violation of that statute requires more than just unknowing or negligent participation in the activity; a violation of 18 U.S.C. § 2(a), which prohibits aiding and abetting the commission of an offense against the United States, requires not only the participation of a person in an unlawful venture, but participation "with the desire that the crime be accomplished." United States v. Newman, 490 F.2d 139, 143 93d Cir. 1974); see also United States v. Waller, 607 F.2d 49, 51-52 (3d Cir. 1979). The plaintiffs have pointed to absolutely no evidence which demonstrates that a genuine

issue of fact exists regarding either Lockhart & Monteleone's knowledge that the removal of plaintiffs' vehicles was part of a scheme of transportation or sale of stolen vehicles or Lockhart & Monteleone's desire that achievement of such an unlawful scheme or venture be accomplished.

As discussed above, plaintiffs have not pointed to sufficient evidence from which a reasonable jury could infer that Lockhart & Monteleone committed any acts of racketeering activity. 3

3 This court concludes that reasonable minds could not differ in characterizing the intent of Lockhart and Monteleone and that no jury issue of credibility is presented by the evidentiary materials of record. This court's resolution is based on an evaluation of the sufficiency of the evidentiary materials of record and not on a choice between competing inferences reasonably drawn from the underlying facts, and, therefore, summary judgment is appropriate.

Lockhart's admission that he informed plaintiffs by phone on November 20, 1985 that

he was scheduled to enforce the writ of possession that day is not sufficient evidence from which a jury might reasonably find that Lockhart committed an act of wire fraud under 18 U.S.C. § 1343. Plaintiff has pointed to absolutely no evidence to support an inference that the phone call was an interstate communication, an essential element of a federal wire fraud violation. See H.G. Gallimore, Inc. v. Abdula. 652 F. Supp. 437, 449 (N.D. Ill. 1987). Furthermore, plaintiff has pointed to no evidence which demonstrates that the phone call of November 20, 1985 was made for the purpose of furthering a scheme to defraud or deceive. Plaintiffs' complete failure of proof on either of these essential elements necessarily renders all other facts immaterial, and plaintiffs have thus failed to meet their burden as nonmovants in

demonstrating a genuine issue of act regarding the commission of a federal wire fraud violation by Lockhart . See Celotex Corp. v. Catrett, 474 U.S. 317, 323 (1986).

Plaintiffs have not pointed to, nor has an extensive review of the evidentiary materials of record disclosed, any other evidence from which a reasonable jury could find that at least two acts of racketeering activity were engaged in by the defendants in this action in the context of the violations of section 1962(b) and (c) alleged by the plaintiffs. Therefore, plaintiffs have failed to demonstrate a genuine issue of material fact regarding an essential element of a violation of either section 1962(b) or (c), and summary judgment against the plaintiffs and in factor of Lockhart and Monteleone on plaintiffs' claims of damages

resulting from violations of these provisions is appropriate. 4

4. An additional interpretation of RICO would impose liability on any person who aided and abetted another person in violating the substantive provisions of RICO. See, e.g., United States v. Wyatt, 807 F2d 1480, 1482 (9th Cir.) (imposition of aiding and abetting criminal liability for violation of section 1962(a) upheld), cert. denied, 108 S.Ct. 170 (1987). However, plaintiffs have failed to point to any evidence from which a reasonable jury could infer any intent on the part of Lockhart and Monteleone that this crime, the substantive violation of either section 1962(b) or (c), be accomplished.

Moreover, even if plaintiffs had demonstrated sufficient evidence from which a jury could find that the defendants in this action engaged in a pattern of racketeering activity, plaintiffs have failed to point to sufficient evidence in support of additional essential elements of each of the specific violations of RICO alleged as the basis of their claim for damages against Lockhart & Monteleone. Accordingly, I do not reach the

issue of Lockhart and Monteleone's claim of absolute immunity from civil RICO liability.

Section 1962(b)

To recover for injuries suffered as a result of a violation of section 1962(b), plaintiffs must demonstrate that Lockhart and Monteleone acquired or maintained an interest in or control of an enterprise as defined by the provisions of RICO. Plaintiffs allege that Lockhart and Monteleone participated in the seizure of Bob's Auto Repair. Nevertheless, plaintiffs have simply not pointed to any evidentiary materials of record which demonstrate the existence of a genuine issue of fact regarding the acquisition or maintenance of an interest in or control of Bob's Auto Repair, alleged as the enterprise for purposes of the section 1962(b) claim, by Lockhart and Monteleone. Enforcing a writ of possession on premises

leased by a business is not the equivalent of acquiring an interest in or control of that business or its property. See, e.g. Cincinnati Gas & Elec. Co. v. General Elec. Co, 656 F. Supp. 49, 85 (S.D. Ohio 1986) (listing cases discussing section 1962(b) interest).

Moreover, while plaintiffs have pointed to Lockhart & Monteleone's admission that Monteleone advised several plaintiffs that their property was confiscated during the execution of the writ of possession, in order to establish a violation of section 1962(b), a plaintiff must show the acquisition or maintenance of an interest in or control of the enterprise, not simply an interest in or control of property of funds of the enterprise. See P.M.F. Services, Inc. v. Grady, 681 F. Supp. 549 (N.D. Ill. 1988). Therefore, plaintiffs have failed to meet

their burden as nonmovants in response to the defendants' motion for summary judgment as to the claim under section 1962(b).

Section 1962(c)

The essential elements of a claim under 1962(c) are "(1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity." Marshall Silver Const. Co., Inc. v. Mendel, 835 F. 2d 63, 65 (3d Cir. 1987) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)). Plaintiffs have alleged that the RICO enterprise for the purposes of their claim against Lockhart and Monteleone for injuries suffered as a result of a violation of section 1962(c), "is an association in fact which revolved around Defendant Mairone and include [sic] within it all of the Defendants." Plaintiffs' RICO case statement at 26. After an exhaustive review of the

evidentiary materials of record in this case, I conclude that plaintiffs have failed to refer to sufficient evidence from which a reasonable jury could find that such an enterprise, as defined by the Third Circuit, existed.

The elements of a RICO enterprise for purposes of section 1962(c) are (1) the existence of an ongoing organization with an operational or decisional framework; (2) the functioning of members or associates of the enterprise as a unit and with certain duties; and (3) the separate existence of the enterprise apart from the pattern of activity engaged in by the enterprise. Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 689-90 (3d Cir. 1984) (citing United States v. Riccobene, 709 F. 2d 214, 221-24 (3d Cir.) cert. denied, 464 U.S. 849 (1983)), cert. denied, 469 U.S. 1211 (1985).

Documents attached by the plaintiffs to their earlier motion for summary judgment against defendants Kutner Buick, Inc. and George Brown, filed August 16, 1988 show that Kutner Buick sold over 1,000 used cars to Active Auto Sales, Inc., another named defendant in this action, from 1985 through 1987. Plaintiffs further claim in their memorandum in support of the summary judgment motion against Kutner Buick and Brown that the receipts from those sales were initialized by named defendant Anthony Mairone. However, plaintiffs have pointed to no evidence to support a reasonable inference by a jury that the initials on the receipts were in fact Mairone's initials.

Plaintiffs have also submitted photographs which they claim show George Brown, a named defendant and an employee of Kutner Buick, both inside and outside the

premises of 4105 Kensington Avenue on February 6,1986 and which they claim show a car owned by Kutner Buick parked outside those premises on that day. Additionally, Kutner Buick has admitted that defendant Ellis Bolot was employed by Kutner Buick prior to 1982. Bolot has admitted that he is an employee of Active Auto Sales, Inc. in his answer to plaintiffs' third amended complaint.

Plaintiffs further claim in their memorandum in support of their August 16, 1988 motion for summary judgment that named defendants John Scarcelli and Paul Piccone have advised plaintiffs that they were also former employees of Kutner Buick, Inc. Scarcelli has admitted his status as President of named defendant Active Auto Sales, Inc. and Piccone has admitted he is employed by Active Auto Sales, Inc.

Additionally, named defendants Anthony Mairone and Angelo Altimari have admitted that defendant Altimari works for Active Auto Sales, Inc. and that he is co-owner of 4101-07 Kensington Avenue, Philadelphia, Pennsylvania with his son-in-law, defendant Mairone. It is also admitted that Active Auto Sales, Inc. does business at 4101-03 Kensington Avenue, Philadelphia, Pennsylvania, as a used car outlet.

The evidence pointed to by plaintiffs, however, is insufficient to demonstrate a genuine issue of fact regarding the existence of an ongoing organization with an operational and decisional framework, consisting of all the named defendants, which plaintiffs have alleged to be the RICO enterprise for purposes of their section 1962 claims. Furthermore, plaintiffs have not pointed to evidence of record from which a

reasonable jury could find that the named defendants, as members or associates of the enterprise, functioned as a unit with certain roles and established duties. Finally, the plaintiffs have not referred to evidence which demonstrates a genuine issue of fact regarding the third element of a RICO enterprise, the existence of the enterprise as an entity separate and apart from the pattern of activity in which it engaged.

Drawing all justifiable inferences in the plaintiffs' favor, as I must, See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), I conclude that plaintiffs have failed to meet their burden as nonmovants of pointing to evidence from which a reasonable jury might find that the named defendants in this action constitute an enterprise. Plaintiffs have, therefore, failed to meet their burden of demonstrating

a genuine issue of act regarding the existence of an enterprise, an essential element of plaintiffs' section 1962(c) claim.

Moreover, plaintiffs have pointed to no evidence from which a reasonable jury could infer that Lockhart and Monteleone had any contact whatsoever with any of the other defendants in this action other than during the time that Lockhart and Monteleone have admitted they were on the premises of Bob's Auto Repair to execute the writ of possession. Accordingly, plaintiffs have failed to point to any evidence in support of their allegation that Lockhart & Monteleone were employed by or associated with the alleged enterprise. See Unites States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977).

Section 1962(d)

Plaintiffs allege that defendant Lockhart violated section 1962(d), the conspiracy subsection of RICO. Plaintiffs allege that Lockhart made a false phone call which was intended to coerce the plaintiffs into giving up control of Bob's Auto Repair, and that he thereby conspired, along with several other named defendants, to violate section 1962(b). Lockhart admits that he made a phone call on November 20, 1985, in which he informed plaintiff Robert Kurz, Sr. that a writ of possession was to be executed that day on the premises of 4105 Kensington Avenue, Philadelphia, Pennsylvania. Plaintiffs allege that this call, in which Lockhart allegedly stated that he and defendant Monteleone were on the premises waiting to enforce the writ, resulted in the false arrest of several plaintiffs and was

part of a conspiracy designed to gain control of Bob's Auto Repair.

The essential elements of a conspiracy claim under 1962(d) are: (1) agreement to commit predicate acts, and (2) knowledge that the acts were part of a pattern of racketeering activity conducted in such a way as to violate section 1962(a), (b), or (c). See Odesser v. Continental Bank, 676 F. Supp. 1305, 1312-13 (E.D. Pa. 1987) (citing Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 792 n.8 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985)). Plaintiffs have pointed to no evidence from which a reasonable jury might infer that Lockhart agreed with any of the named defendants or with anyone, to the commission of any predicate acts of racketeering activity. Furthermore, plaintiff has failed to point to any evidence which raises a genuine issue of

fact regarding Lockhart's knowledge that those acts were part of a pattern of racketeering activity conducted to seize control of or acquire an interest in Bob's Auto Repair, so as to violate section 1962(b). Therefore, defendant Lockhart is entitled to summary judgment against the plaintiffs on the plaintiffs' claim that he violated section 1962(d).

In summary, I conclude that for the reasons discussed above, plaintiffs have failed to demonstrate that a genuine issue of material fact exists regarding essential elements of each of the provisions of RICO alleged to have been violated by Lockhart and Monteleone. Accordingly, Lockhart and Monteleone's motion for summary judgment will be granted. 5

5. Plaintiffs' pendent claims under state law against Lockhart and Monteleone, asserted in Count II of plaintiffs' third amended complaint, will be dismissed in light

of the entry of summary judgment against plaintiffs and in favor of Lockhart and Monteleone on plaintiffs' federal claims.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KURZ, SR et al,	:	Civil Action
v.	:	
ANTHONY MAIRONE, et al	:	No. 86-5587

ORDER

AND NOW, this 22nd day of December, 1988, upon consideration of the motion of John Lockhart and Anthony Monteleone for summary judgment against the plaintiffs on the plaintiffs' claims, the response of the plaintiffs thereto, and the oral argument of the parties, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The motion of John Lockhart and Anthony Monteleone for summary judgment is GRANTED.

2. Judgment is entered in favor of defendants John Lockhart and Anthony

Monteleone and against plaintiffs Robert Kurz, Sr., Rosemary Kurz, t/a Blue LIne Cab, Robert Kurz, Jr., Shawn Kurz, steven Kurz, and Margaret M. Kurz.

BY THE COURT:

JAMES MCGIRR KELLY, J.

SUPREME COURT OF THE UNITED STATES

No. A-518

Robert Kurz, et al., Petitioners

v.

Anthony Mairone, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 5, 1983.

/s/ David H. Souter

Associate Justice of the

Supreme Court of the
United States

Dated this 5th
day of January, 1993